



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER MO-1824-I

**Appeals MA-030117-1, MA-030118-1 and
MA-030121-1**

South Bruce Grey Police Services Board



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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), two requesters jointly submitted three separate requests for information to the South Bruce Grey Police Services Board, now known as the Hanover Police Services Board (the *Police*), all pertaining to the same named individual. They asked for:

1. A list of reloading equipment and weapons surrendered by the named individual after his sentencing hearing (Appeal MA-030117-1);
2. The physical description of a specified weapon contained in any record and/or report (Appeal MA-030118-1);
3. A copy of the occurrence report relating to the named individual's arrest on a specific date (Appeal MA-030121-1).

In each case, the *Police* denied the requesters access to all or portions of the requested records under the exemptions relating to law enforcement (section 8), personal privacy (section 14) and access to one's own information (section 38). Before issuing their decisions, the *Police* notified the named individual to seek his views on disclosure. He did not respond.

The requesters (now the appellants) appealed each of the decisions. In their appeal letters, the appellants refer to section 5(1) of the *Act*, which permits a head to disclose information that discloses a grave environmental, health or safety hazard to the public.

During mediation, a number of issues were resolved or narrowed. First, in each case, the *Police* dropped all exemptions in respect of the records at issue except sections 38(b) and/or section 14(1) in conjunction with section 14(3)(b). Second, the *Police* indicated that there were no records pertaining to the individual's surrender of reloading equipment, and the appellants accepted this to be the case. Third, the *Police* located another responsive record, a Crown brief, which was attached to the arrest report, and disclosed some parts of it that contained the appellants' personal information. The withheld parts of the Crown brief were denied under section 38(b) in conjunction with section 14(3)(b).

Also during mediation, the appellants accepted that section 5(1) of the *Act* is not a matter over which the Commissioner or her delegates have the power to make an order (Orders P-482, M-401).

The records that remain at issue (and the exemption now claimed for each) are:

Record 1: two lists of weapons surrendered (section 14(1) in conjunction with section 14(3)(b));

Record 2: entries in a General Occurrence Report describing the weapons (section 38(b) in conjunction with section 14(3)(b))

Record 3: an arrest report (section 14(1) in conjunction with section 14(3)(b));

Record 4: portions of a Crown brief (section 38(b) in conjunction with section 14(3)(b)).

The Commissioner's office initially sent a Notice of Inquiry covering all three appeals to the Police. In response to the notice, the Police submitted brief representations in relation to all three appeals. This office then sent a Notice of Inquiry to the requesters along with a copy of the Police's representations in their entirety. The appellants then submitted representations in relation to all three appeals.

DISCUSSION:

PERSONAL INFORMATION

To determine whether the records are exempt from disclosure under sections 14 and 38(b) of the *Act*, I must first decide whether the records contain "personal information" as defined in the *Act* because these sections only apply to information that qualifies as "personal information".

"Personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

I have considered the representations before me and examined all of the records at issue.

I find that Records 1 and 3 contain only the personal information of the named individual, including his name, date of birth, and his name appearing with other personal information relating to him or where the disclosure of his name would reveal other personal information.

I find that Records 2 and 4 contain the personal information of the appellants and the named individual. That personal information consists of their names, addresses, dates of birth and their names where they appear with other personal information relating to them or where the disclosure of their names would reveal other personal information.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Introduction

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute and "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. If the information falls within the scope of section 38(b), that does not end the matter, however, as the institution may exercise its discretion to

disclose the information to the requester. I will review the Police's exercise of discretion under section 38(b) later in this order, after I have decided whether the exemption applies.

Where the record only contains the personal information of other individuals, section 14(1) prohibits an institution from disclosing personal information to any person other than the individual to whom the information relates unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception that could be relevant in this appeal is section 14(1)(f), which provides an exception to the section 14(1) exemption "if the disclosure does not constitute an unjustified invasion of personal privacy."

In both of these cases, sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Section 14(3) lists the types of information the disclosure of which is *presumed* to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, section 14(2) requires me to consider all relevant circumstances, including the factors listed therein and any unlisted factors, in order to determine whether disclosure would constitute an unjustified invasion of personal privacy.

Police representations

The Police submit that Records 1 and 3 are exempt under section 14(1) on the basis of the presumed unjustified invasion of privacy at section 14(3)(b) of the *Act*, which applies to records compiled and identifiable as part of an investigation into a possible violation of law. They further submit that the responsive parts of Record 2 and the withheld parts of Record 4 are subject to section 14(3)(b) and are therefore exempt under section 38(b).

Appellants' representations

The appellants raise the possible application of section 16 of the *Act* (the "public interest override") in their representations for the first time. Rather than directly addressing the application of sections 38(b), 14(1) or 14(3)(b), or any of the listed factors under section 14(2), their representations are aimed at demonstrating that the records should be disclosed because of public safety considerations.

Section 14(3)(b)

Section 14(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

Record 2 is a General Occurrence Report prepared in the course of investigating of a possible weapons-related offence. Record 4 is a Crown brief prepared for use in prosecution. It contains copies of police officers' notes and transcriptions thereof, witness statements and a CPIC report, all of which were obtained during the course of a criminal investigation. Subject to my discussion of the "absurd result" principle below, I therefore find that Record 2 and these parts of Record 4 were compiled and are identifiable as part the Police's investigation into possible offences under the *Criminal Code* and thus meet the requirements of section 14(3)(b).

As regards Records 1, 3 and the remainder of Record 4, the evidence before me indicates that they were not "compiled" or "identifiable" as part of an investigation into a possible violation of law. Record 1 describes weapons surrendered by the named individual as the result of a court-imposed sentencing requirement, and this event was not part of an investigation. Record 3, an Arrest Report, relates to the named individual's arrest subsequent to the laying of criminal charges against him, and again, was not part of an investigation. Similarly, in the absence of evidence that the investigation continued during and after the named individual's trial, the components of Record 4 that were prepared for use in prosecuting the named individual and dealing with him after his conviction are not compiled or identifiable as part of an investigation. These include confidential instructions to the Crown, the Crown brief synopsis, remand and bail-related documents, several informations, a witness list, subpoenas to witnesses and instructions for serving them, probation documents, and other post-conviction records and correspondence. I find that the presumption in section 14(3)(b) has no application to Records 1, 3 and the parts of Record 4 I have just described.

I will therefore review the factors under section 14(2) to determine whether disclosure of the information that does not fall under section 14(3)(b) would be an unjustified invasion of personal privacy.

Section 14(2)

The representations of the Police do not refer specifically to any of the listed considerations favouring non-disclosure of the requested information under section 14(2). The information before me indicates that the circumstances surrounding the investigation and laying of charges against the named individual and the named individual's surrender of weapons pursuant to an earlier court-imposed sentence, as well as the history of conflict between the appellants and the named individual, would support the application of the factors at sections 14(2)(f) and (h), which applies to information that is "highly sensitive", or was "supplied in confidence" by the individual to whom it relates. In my view, these sections are a significant consideration favouring privacy protection in the circumstances of this appeal.

The appellants make no specific reference to any of the factors listed in section 14(2). As noted above, their representations make reference to the public interest in disclosure of the information because of their view that disclosure would promote the objective of public safety.

The issues of public safety and the public interest in disclosure are addressed in sections 5(1) and 16 of the *Act*, both of which are raised by the appellants in their representations. As noted previously, the appellants accepted the mediator's explanation that section 5(1) is not subject to the order-making power of the Commissioner or her delegates. This issue is not before me and I will not refer to it again. I will consider the possible application of section 16 later in this order.

In summary, two factors favouring non-disclosure under section 14(2) apply. Accordingly, subject to my discussion of "absurd result" below, I find that disclosure of the withheld information not already covered by section 14(3)(b) would therefore be an unjustified invasion of personal privacy.

Section 14(4)

Section 14(4) provides that the disclosure of several enumerated categories of information is not an unjustified invasion of personal privacy. I find that none of the withheld information falls within these categories and section 14(4) therefore has no application in this appeal.

Absurd Result

A number of previous orders have found that non-disclosure of personal information where the appellant originally supplied the information to the institution, or is otherwise aware of it, would contradict one of the primary purposes of the *Act*, to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. These orders determined that applying the presumption in section 14(3)(b) of the *Act* (or the equivalent provision in the *Freedom of Information and Protection of Privacy Act*) would, according to the rules of statutory interpretation, lead to an "absurd" result.

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

In this case, the Police have severed parts of the appellants' handwritten statements, which form part of Record 4. The Police have also withheld the police officers' notebook passages that record their conversations and interactions with the appellants, which are also found in Record 4. This is information which would otherwise be subject to the section 14(3)(b) presumption, but in my view, applying the presumption to it would lead to an absurd result. Accordingly, I find that section 14(3)(b) does not apply to the withheld portions of the appellants' statements, nor does it apply to the notebook entries recording the police officers' conversations and interactions with the appellants. I have also considered the factors in section 14(2) and all of the circumstances of this appeal, and I find that disclosure of this information would not be an unjustified invasion of personal privacy.

Summary of Findings re Sections 14 and 38(b)

To conclude, I have found that, except for the information that falls within the "absurd result" principle, disclosure of all of the other withheld information would constitute an unjustified invasion of personal privacy. I therefore find that Records 1 and 3 are exempt under section 14(1), and the responsive parts of Record 2 and the withheld portions of Record 4, except the passages to which the absurd result principle applies, are exempt under section 38(b).

COMPELLING PUBLIC INTEREST

The appellants assert that section 16 applies such that there is a compelling public interest in the disclosure of all of the records that outweighs the purpose of the personal privacy exemption.

Section 16 of the *Act* states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In order for section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488

(C.A.]. The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

The appellants submit, in part:

The request for the list of weapons remains important to us. [The named individual] was ordered to surrender all of his weapons, reloading equipment and related materials ... at a Sentencing Hearing [on a specified date] for the assault on [one of the appellants]. A list of weapons, reloading equipment and reloading materials turned over to the South Bruce Grey/Hanover Police Service would therefore be important not only to us, but the public at large. Had [the named Justices] not believed the surrender of such weapons was extremely important to the public safety, the order to surrender such weapons would not have been made.... The appellants request this information under Section 16 and Section 5(1).

It is clearly in the public’s interest to have a safe and law abiding society in Canada. The actions of [the named individual] with regard to the appellants (victims) and other members of society clearly outweigh the reasons for denying access to the information requested. The appellants... are currently involved in a civil matter due to the injuries, threats and stress added to their lives by [the named individual]. The appellants... are seeking to have the pistol grip sawed off shotgun permanently removed from society to create a safer environment for all of society, not exclusively for ourselves ...

The request for the physical description of the pistol grip sawed off shotgun, including the serial number, is extremely important to the public safety and the appellant’s (victim’s) safety. The information being requested is not personal information in regard to [the named individual]. [He] has already been convicted of the assaults and his personal information was put on the record at the time of his sentencing by the Crown Attorney with regard to his previous criminal conviction(s). ... The information requested regarding the pistol grip sawed off shotgun could have no negative impact upon [the named individual]. ... The pistol grip sawed off shotgun is no longer in the possession of [the named individual] ... We rely on Section 16 ... in our request for this information. ...

The request for [the arrest report] is once again information that should be made available to the public and the appellants (victims), for their safety. ... In the interest of public safety to the appellants (victims) and other members of the community whose lives have been affected by [the named individual], we find the request for this information to be extremely reasonable. The public’s safety should be the paramount interest of the municipal police force involved, the Information and Privacy Commissioner and that of every government, ministry

and body within the Municipality, the Province of Ontario and the Dominion of Canada.

To summarize, the appellants argue that the interest of public safety would be advanced by disclosure of the withheld information, and in particular, information about weapons surrendered by the named individual to the police (Records 1 and 2), and the arrest report (Records 3 and 4). As regards Records 1 and 2, I note that the weapons are in police custody. With respect to Records 3 and 4, I have reviewed these records and have not found any information that triggers a compelling public interest of the sort contemplated by the appellants. While public safety is a legitimate public interest, and at times a compelling one, I am not persuaded that the disclosure of the withheld information would advance this interest.

EXERCISE OF DISCRETION

The section 38(b) exemption claimed for Record 2 and parts of Record 4 is discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the Police must exercise discretion in deciding whether or not to disclose it. Under section 38(b), this involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

The Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant (Orders P-344, MO-1573):

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

The decision letters provided by the Police in response to the appellant's request contain no reference to the exercise of discretion when deciding to claim section 38(b) as the basis for denying access. The Notice of Inquiry asked the Police to provide representations on the factors it considered in exercising discretion but the Police did not do so.

In the circumstances, I am not persuaded that the Police have exercised discretion in denying access to the portions of Records 2 and 4 that I have determined qualify for exemption under section 38(b), and I will include a provision in this interim order requiring the Police to do so.

ORDER:

1. I order the Police to disclose the following parts of Record 4: (1) unsevered copies of the statements provided by the appellants, and (2) the police officers' notebook passages that record their conversations and interactions with the appellants. For greater certainty, I have provided copies of these records to the Police with a copy of this order. Highlighted passages in the police officers' notebooks are **not** to be disclosed. I order the Police to disclose this information by sending it to the appellants on or before **September 21, 2004**.
2. In order to verify compliance with Order Provision 1, I reserve the right to require the Police to send me a copy of the information that is disclosed to the appellants.

3. I uphold the decision of the Police to deny access Records 1 and 3 under the mandatory exemption at section 14(1) of the *Act*. I also uphold the Police's decision that the responsive parts of Record 2 and the withheld information in Record 4 (except the information mentioned in Order Provision 1) fall within the scope of the discretionary exemption at section 38(b) of the *Act*.
4. I order the Police to exercise discretion regarding the application of section 38(b) to the responsive parts of Record 2 and the withheld information in Record 4 (except the information mentioned in Order Provision 1), and to provide me and the appellants with an outline of the factors considered in exercising discretion in this context by **September 14, 2004**. I then ask the appellants to provide representations to me on whether the Police properly exercised their discretion by **September 28, 2004**.
5. I remain seized of this appeal in order to deal with any issues stemming from the exercise of discretion by the Police.

Original Signed By: _____
John Higgins
Senior Adjudicator

August 30, 2004 _____